

Bonini (Migration) [2019] AATA 2441 (8 May 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Ms Diva BONINI
Miss Sthefany Hellen BONINI CARVALHO

CASE NUMBER: 1710507

HOME AFFAIRS REFERENCE(S): BCC2015/3322222

MEMBER: Mireya Hyland

DATE: 8 May 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211 of Schedule 2 to the Regulations
- cl.820.221(1) of Schedule 2 to the Regulations

The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the second named applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.311 of Schedule 2 to the Regulations

Statement made on 08 May 2019 at 5:10pm

1.

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – genuine spousal partners – evidence of financial and social aspects of relationship provided – mutual commitment to shared life together to exclusion of all others – genuine and continuing relationship – decision under review remitted

LEGISLATION

*Migration Act 1958 (Cth), ss 5F, 65, 351
Migration Regulations 1994 (Cth), rr 1.03, 1.05, 1.12, 1.15, Schedule 2, cls 820.211,*

820.221, 820.311, 820.321

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicants, Diva Bonini and Sthefany Hellen Bonini Carvalho, Partner (Temporary) (Class UK) visas under s.65 of the *Migration Act 1958* (the Act).
3. Ms Bonini applied for the visa on 11 November 2015 on the basis of her relationship with her sponsor, Admilson Montanha. At that time, Class UK contained one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The delegate refused to grant the visa on 28 April 2017 on the basis that cl.820.211(2) was not met because there was insufficient evidence to demonstrate that Ms Bonini is the spouse of Mr Montanha.
4. Ms Bonini applied to the Tribunal, differently constituted, on 17 May 2017. On 19 March 2019 the matter was reconstituted and Ms Bonini and Ms Bonini Carvalho appeared before the Tribunal, as currently constituted, on 10 April 2019 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Montanha. The Tribunal hearing was conducted with the assistance of an interpreter in the Portuguese and English languages. The applicants were represented in relation to the review by their registered migration agent. The representative attended the Tribunal hearing.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. At the time of the application Ms Bonini was not the holder of a Subclass 771 (Transit) visa and, for the reasons below, she met the requirements of cl.820.211(2) at the time of the application. Therefore, Ms Bonini satisfies cl.820.211(1) of the Regulations.
7. Clause 820.211(2)(a) requires that at the time when the visa application was made the applicant was the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case Ms Bonini claims to be the spouse of Mr Montanha, who as the holder of a Return (Residence) (Class BB) Subclass 155 (Five Year Resident Return) visa is an Australian permanent resident: cl.820.211(2)(a)(i). Also, the sponsor must not be prohibited by cl.820.211(2B) of the Regulations from being a sponsoring partner: cl.820.211(2)(a)(ii). Since he is not a woman who was granted a Subclass 204 (Woman at Risk) visa within the five years immediately preceding the application, Mr Montanha is not prohibited from being a sponsoring partner: cl.820.211(2B) (a).
8. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, and the nature of their household and commitment to each other: r.1.15A(3). Each of the specific matters

contained in r.1.15A(3) are effectively questions which must be answered¹ and the Tribunal has considered and satisfied itself about each.

9. The Tribunal has viewed Ms Bonini's and Mr Montanha's marriage certificate and finds they were married to each other under a marriage that is valid for the purposes of the Act. They meet s.5F(2)(a).
10. The Tribunal has considered the evidence provided by Ms Bonini and Mr Montanha, including their written statements, extensive bank documentation over time that reflect their day to day expenditures and support their oral evidence, financial remittances, information about Mr Montanha's superannuation beneficiary, documents confirming their residence, photographs, immigration and travel history, and the statements from friends and family. It has put particular weight on their testimony at the hearing and the oral submissions of their representative. The Tribunal finds that the evidence strongly supports that the financial aspects of the relationship, the nature of their household, social aspects of their relationship, nature of their commitment to each other, and all the other circumstances of the relationship demonstrate that they have a genuine and continuing mutual commitment to each other.
11. The Tribunal finds that Ms Bonini and Mr Montanha have a mutual commitment to a shared life together to the exclusion of all others, are in a genuine and continuing relationship, and live together in Norman Gardens, Queensland. They, therefore, meet all the requirements in s.5F(2)(b), (c), and (d) of the Act.
12. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) of the Act were met at the time of application. Although some of the matters on which it has relied occurred after that date, it finds they are nonetheless indicative of the couple's relationship on 11 November 2015. Therefore, Ms Bonini was the spouse of Mr Montanha and meets cl.820.211(2)(a) of the Regulations. The Tribunal is satisfied that Ms Bonini was sponsored by Mr Montanha who had turned 18 years of age and so satisfies cl.820.211(2)(c). On 15 June 2015 Ms Bonini was granted a Visitor (Class FA) Subclass 600 visa that ceased on 11 November 2015. Ms Bonini was the holder of a substantive visa on 11 November 2015 so cl.820.211(2)(d) is not engaged.
13. The Tribunal finds that at the time of application Ms Bonini met the requirements in cl.820.211(2) of the Regulations. Since Ms Bonini was the holder of a substantive visa at the time of application and that visa was not a Subclass 300 (Prospective Marriage) visa, cl.820.211(5)-(9) are not relevant to this matter. Likewise, Ms Bonini is not one of the class of persons to whom cl.820.211(2A) applies. Ms Bonini meets cl.820.211 of the Regulations.
14. The Tribunal also finds that at the time of this decision Ms Bonini is the spouse of her sponsoring spouse, Mr Montanha, who is an Australian permanent resident over the age of 18 and so continues to meet the requirements of cl.820.211(2)(a) and (c) of the Regulations. She, therefore, meets cl.820.221(1) of the Regulations.
15. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

MS BONINI CARVALHO

16. Relevant to this case, cl.820.311(a)(i) requires that at the time of the application Ms Bonini Carvalho was the dependent child of a person who has applied for a Partner (Residence) (Class BS) visa. Regulation 1.03 defines 'dependent child' as, among other things, the child of a person (other than a child who is engaged to be married or has a spouse or de facto partner) who has not turned 18.

¹*He v MIBP* [2017] FCAFC 206.

17. Ms Bonini is a person who has applied for a Partner (Residence) (Class BS) visa. The Tribunal accepts that Ms Bonini Carvalho is Ms Bonini's child. It also accepts that she is not engaged to be married and does not have a spouse or de facto partner. Ms Bonini Carvalho was born on 11 May 2001. Therefore, on 11 November 2015, the date of the application, she had not turned 18. Ms Bonini Carvalho meets cl.820.311(a).
18. The Tribunal finds that Mr Montanha's sponsorship of Ms Bonini includes Ms Bonini Carvalho and on 11 November 2015 the Minister had not decided to grant or refuse a visa to Ms Bonini. Therefore, Ms Bonini Carvalho meets cl.820.311(b) and (c).
19. Clause 820.321 requires that at the time of this decision Ms Bonini Carvalho be dependent on, or a member of the family unit of, a person who having satisfied the primary criteria, is the holder of a Subclass 820 (Partner) visa (the person who satisfies the primary criteria). Ms Bonini is not currently the holder of a Subclass 820 (Partner) visa, therefore, Ms Bonini Carvalho cannot presently meet cl.820.321. Nonetheless, for completeness the Tribunal finds that pursuant to r.1.12(1)(b) a dependent child would be a member of the family unit of the person who satisfies the primary criteria. At the time of this decision Ms Bonini Carvalho is under 18 and so is still the dependent child of Ms Bonini. Except for the fact that her mother does not hold a Subclass 820 visa, she meets cl.820.321 of the Regulations.
20. Given all the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

Ministerial Referral

21. The Tribunal notes that Ms Bonini Carvalho will most likely have turned 18 years old before the Minister has considered the remaining criteria for Ms Bonini's Subclass 820 visa. Therefore, to meet cl.820.321 she will need to be dependent on Ms Bonini as defined in r.1.05A of the Regulations. This requires that Ms Bonini Carvalho has been for a substantial period wholly or substantially reliant on Ms Bonini for financial support to meet her basic needs for food, clothing and shelter. The Tribunal anticipates that this might be problematic.
22. Ms Bonini Carvalho lives with her mother and step-father, however, she has been working for some time and meets her own basic needs for clothing from that salary. She does not pay for her accommodation, but she regularly contributes financially to the food for the household. This may indicate that she is not dependent on Ms Bonini as that is defined by the Regulations. In the circumstances, it is not necessary, or appropriate, for the Tribunal to make a finding on that question. However, should it be determined that she does not meet cl.820.321, having regard to Ms Bonini Carvalho's circumstances, and having considered the ministerial guidelines relating to the Minister's discretionary power under s.351 of the Act set out in *PAM3: Minister's guidelines on ministerial powers (s351, s417 and s501J)* (the Guidelines), the Tribunal considers that this case should be brought to the Minister's attention.
23. Should it be determined that she is not eligible for the grant of a Subclass 820 visa, the Tribunal believes that Ms Bonini Carvalho's case involves a unique or exceptional circumstance, such as those described in Section 4 of Guidelines, and so should be referred to the Minister for consideration of the use of his or her intervention powers. There are circumstances not anticipated by the relevant legislation and clearly unintended consequences. Ms Bonini applied for the visa on 11 November 2015 when her daughter was 14 years old. It is unthinkable that she would not have brought her child to Australia and included her in the visa application. However, the legislation does not anticipate that it would take over three and a half years for the temporary visa application to be decided with the unintended result that Ms Bonini Carvalho, who has been in Australia since she was 14, will at only 18 years of age be separated from her mother and returned to Brazil.

24. It can be clearly seen that Ms Bonini Carvalho's circumstance is not anticipated by the legislation from the difference in the time of decision criteria for secondary applicants in the temporary Subclass 820 visa and the permanent Partner (Residence) (Class BS) Subclass 801 visa. For the Subclass 801 visa there is a presumption that, since at least two years from the date of the application has passed, it is possible children who could not be separated from their parent at the time of application have now turned 18 and started to financially contribute to their own upkeep. Therefore, it is not a requirement at the time of the decision to grant the visa that they be dependent children or members of the primary applicant's family unit, only that they were members of the family unit at the time of application. It can be inferred that it is an expectation of the legislation that a Subclass 820 visa will have been granted well before the two years from the date of the application that triggers eligibility for the Subclass 801. Therefore, that legislation cannot have anticipated circumstances where three and four years have passed between the time of application and time of decision for the Subclass 820.
25. While delay in granting visas is a growing problem the legislation has not kept pace with, Ms Bonini Carvalho's case is unique in that her case was constituted on 15 February 2018 and would, in the normal course, have been finalised well before her 18th birthday except that the member became unavailable. The matter then had to be reconstituted which did not occur until 19 March 2019. If the application of the relevant legislation has led to Ms Bonini Carvalho not meeting cl.820.321 because she has turned 18 and is not dependent on her mother, that is an unfair and unreasonable result in this particular case. This delay is not, and could not be, anticipated by the legislation which has led to an unintended outcome.
26. The Tribunal knows of no circumstances in this case that would fall within Section 7 of Guidelines relating to the types of circumstances which do not meet the guidelines for referral and are inappropriate for ministerial consideration.

DECISION

27. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211 of Schedule 2 to the Regulations
 - cl.820.221(1) of Schedule 2 to the Regulations
28. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the second named applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.311 of Schedule 2 to the Regulations

Mireya Hyland
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).